Case No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CLARENCE MOORE,
Petitioner,

v.

THE STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL IN AND FOR THE FIFTH DISTRICT OF FLORIDA

JURISDICTIONAL STATEMENT—PETITION

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THE PARTIES

All parties to the cause are named in the caption. Petitioner Clarence Moore was defendant in the Circuit Court of Volusia County, Florida, and appellant in the Fifth District Court of Appeal of the State of Florida. Respondent State of Florida was plaintiff in the Circuit Court and appellee in the Fifth District Court of Appeal.

QUESTION PRESENTED

Where a criminal defendant is charged and tried by a State Court, convicted and sentenced, and the judgment of conviction and sentence are reversed on appeal for procedural error, and a new trial on the original criminal charge is mandated, is it a violation of *U.S. Const. amend. V* prohibiting double jeopardy for the State to amend the substantive facts of the charge in the Information and to try the defendant over his objections on an Amended Information arising out of the same criminal event?

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PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL IN AND FOR THE FIFTH DISTRICT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the District Court of Appeal in and for the Fifth District of Florida in Case no. 87-1179 entitled Clarence Moore, appellant, vs. State of Florida, appellee.

OPINION BELOW

The judgment of the Fifth District Court of Appeal is not reported as of the filing of this petition. It is dated March 15, 1988, and appears in the Appendix (A-18). Timely petition for rehearing was denied by order dated April 19, 1988 (A-19).

JURISDICTION

Jurisdiction is invoked on the ground that a right, privilege, or immunity is claimed under the Constitution, to-wit: the right against former jeopardy under *U.S. Const. amend. V.* the Circuit Court of Volusia County, Florida, denied petitioner's motion to dismiss and motion to dismiss and strike when the issue was presented at the trial level. The District Court of Appeal, Fifth District of Florida, affirmed the trial court's denial by its per curiam affirmance (A-18) dated March 15, 1988, and rendered by its order dated April 19, 1988, which denied petitioner's timely motion for rehearing (A-19). The District Court of Appeal, Fifth District of Florida, is the court of final appeal as a matter of right under the Constitution of the State of Florida.

STATUTE INVOLVED

28 U.S.C. Sec. 1257(3):

State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or *where any title right, privilege or immunity is specially set up or claimed under the Constitution,* treaties or statutes of, or commission held or authority exercised under the United States. June 25, 1948, c. 646, 62 Stat. 929. (emphasis added)

CONSTITUTIONAL PROVISION

U.S. Const. amend. V

> No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases in the land or naval forces, or in the militia, when in actual service in time of war or public danger; *nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb*; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (emphasis added)

STATEMENT OF THE CASE

The State of Florida filed its Information (A-1) against petitioner Clarence Moore and two other defendants. The Information charged petitioner in two of its four counts as follows:

COUNT I

> *Charge:* TRAFFICKING IN MORPHINE, in Violation of F.S. 893.135(1)(c)3
>
> *Specification of charge:* In that WILLIAM CURTIS LANEY, CLARENCE MOORE, and ELVA VANESSA COOPER, on or about the 29th day of November 1984, at or near Daytona Beach within Volusia County, Florida were knowingly in actual or constructive possession of morphine or any salt, isomore, or salt of an isomer thereof, or mixture containing such substance, to-wit: five hundred (500) hydromorphone tablets, and the quantity of morphine or mixture thereof was more than twenty-eight (28) grams.

COUNT II

> *Charge:* CONSPIRACY TO TRAFFIC IN MORPHINE (28 GRAMS OR MORE), in Violation of F.S. 893.135(4)
>
> *Specifications of charge:* In that WILLIAM CURTIS LANEY, CLARENCE MOORE, and

ELVA VANESSA COOPER, on or between the 20th day of November, 1984 and the 29th day of November, 1984, within Volusia County, Florida, did agree, conspire, combine, or confederate with each other to knowingly sell, manufacture, deliver, or to knowingly be in actual or constructive possession of morphine or any mixture containing morphine, in a quantity of twenty-eight (28) grams or more, to-wit: that WILLIAM CURTIS LANEY on November 20, 1984 did meet CI M-102-S and discuss trading cocaine for a large amount of dilaudids, a/k/a morphine, or purchasing several hundred dilaudids with U. S. currency; that in support of said conspiracy and in furtherance thereof WILLIAM CURTIS LANEY did negotiate with CI M-102-S on November 28, 1984 for the purchase of five hundred (500) dilaudids, a/k/a morphine at Fifteen Dollars ($15.00) per pill for a total purchase price of Seven Thousand Five Hundred Dollars ($7,500.00); that in support of said conspiracy and in furtherance thereof WILLIAM CURTIS LANEY instructed CI M-102-S to meet him at Denny's Restaurant located at the intersection of U.S. 92 and I-95 the following day at 12 p.m. to finalize the narcotics transaction; that in support of said conspiracy and in furtherance thereof WILLIAM CURTIS LANEY did meet CI M-102-S on November 29, 1984 at said business establishment where he observed the five hundred (500) dilaudids contained within five (5) bottles and indicated he had an insufficient amount of U. S. currency and would have to go to CLARENCE MOORE'S home for the remainder of the cash; that in support of said conspiracy and in furtherance thereof WILLIAM CURTIS LANEY, CLARENCE MOORE and ELVA VANESSA COOPER returned to said business establishment with Seven Thousand Five Hundred Dollars ($7,500.00) in U. S. currency; WILLIAM CURTIS LANEY then met with CI M-102-S who exchanged two (2) of the bottles of dilaudids for One Thousand Dollars ($1,000.00) in U. S. currency; WILLIAM CURTIS LANEY then returned to his pick-up truck where CLARENCE MOORE and ELVA VANESSA COOPER examined the narcotics and CLARENCE MOORE turned over to WILLIAM CURTIS LANEY a bag containing Six Thousand Five Hundred Dollars ($6,500.00) in U. S. currency for the remaining narcotics; in support of said conspiracy and in furtherance thereof WILLIAM

> CURTIS LANEY then exchanged the Six Thousand Five Hundred Dollars ($6,500.00) in U. S. currency for the remaining three (3) bottles of dilaudids.

Counts III and IV were charges against the co-defendant not pertinent to this petition. Petitioner pleaded not guilty.

Petitioner's trial was severed from that of the other defendants. After a jury trial, petitioner was found guilty on both counts and sentenced. Appeal was taken to the Fifth District Court of Appeal of Florida and the judgment and sentence were reversed because of procedural error in the admission of certain tape recording evidence (*Moore* v. *State*, 503 So.2d 923, Fla. 5th DCA 1987), and a new trial ordered.

The State of Florida thereafter voluntarily filed an Amended Information (A-11) which amended the substantive allegations of Count II to read as follows:

COUNT II

> *Charge:* CONSPIRACY TO TRAFFIC IN MORPHINE (28 GRAMS OR MORE), in Violation of F. S. 893.135(4)
>
> *Specifications of charge:* In that CLARENCE MOORE, WILLIAM CURTIS LANEY, and others known and unknown, on or between the 28th day of November, 1984 and the 29th day of November, 1984 within Volusia County, Florida, did agree, conspire, combine, or confederate with each other to knowingly sell, deliver or to knowingly be in actual or constructive possession of morphine or any mixture containing morphine, in a quantity of twenty-eight (28) grams or more, to-wit: in that CLARENCE MOORE and WILLIAM CURTIS LANEY did agree to purchase five hundred (500) morphine derivative pills that had a total weight of approximately forty-five (45) grams.

Motion to dismiss or strike the Amended Information on double or former jeopardy grounds was denied by the trial court on two occassions as follows:

Order dated April 16, 1987 (A-10):

> This cause is before the court on motions of the defendant to dismiss both counts of the information. The defendant was previously tried, convicted and

sentenced, by the District Court of Appeal, Fifth District, reversed and remanded for a new trial on both counts.

The district court has ruled that certain hearsay evidence was improperly admitted and that the conviction was thus "tainted". This Court has been ordered to retry the case without improperly admitting this hearsay evidence. This in no way constitutes a ruling by the district court that the evidence was insufficient as a matter of law to support the jury's conviction. The district court in fact specifically found the evidence "sufficient" to implicate the defendant as a participant in the trafficking offense and, marginally, as a party to the plan (a conspirator).

Accordingly, there is no former jeopardy bar to retrial, a conclusion the district court obviously shares in light of its direct order that this Court conduct a new trial.

The defendant's motion are denied.

Transcript of Proceedings on April 30, 1987 (A-13):

. . . **THE COURT**: All right, I understand what you're suggesting, and I'm going to deny your motion to dismiss or strike. . . .

THE COURT: I intended in my order of April 16 to apply to your motion to dismiss the amended information. I don't know that you had filed any piece of paper asking for your motion to apply to the amended information as opposed to the original information, but the grounds for your motion fit, your argument fit. And the changes in the information didn't undermine your motion to dismiss in any way.

Your motions are either good or aren't good as to both informations, and so I went ahead and entered the order of April 16th intending that to apply to the amended information, assuming your motion to dismiss stood open.

MR. OSSINSKY: That's fine, Judge. As long as the record clearly indicates that it was intended.

> **THE COURT**: I don't think I can say it any clearer. The order was intended to take into consideration the current status of the pleadings at that time. And I believe they are still current, is that correct?
>
> **MR. STACK**: That's correct.
>
> **THE COURT**: So your former jeopardy grounds are totally preserved. . . .

Appellant thereafter pled not guilty to the Amended Information (A-14). After a second jury trial, petitioner was found guilty on both counts and judgment of conviction and sentence were entered (A-15). Petitioner appealed the judgment and sentence to the Fifth District Court of Appeal of Florida which issued its decision in Case no. 87-1179 on March 15, 1988, which affirmed the judgment of the lower court without opinion (A-18). A timely petition for rehearing was denied April 19, 1988 (A-19). The memorandum decision has not yet been reported. The issue presented to the District Court of Appeal was the denial of petitioner's right against former jeopardy afforded by *U.S. Const. amend. V*, as follows:

> Where a criminal case is reversed on appeal because of procedural error in the introduction into evidence of exhibits and the remaining evidence is insufficient to sustain conviction, a retrial violates the Constitution of the United States because of double jeopardy, particularly where the improperly admitted exhibits are not used as evidence in the second trial and the Information is amended substantively as to the underlying facts of the case.

REASONS FOR GRANTING THE WRIT

Petitioner was tried twice in violation of his constitutional right against double jeopardy. Petitioner was arrested along with William Curtis Laney as an alleged coconspirator and participant for trafficking in drugs on November 9, 1984, and conspiracy to traffic in drugs between November 20, 1984, and November 29, 1984. Petitioner pled not guilty and was tried and convicted on a two count Information. His trial was separate from all other defendants. The judgment and sentence was reversed on appeal (*Moore* v. *State*, 503 So.2d 923, Fla. 5th DCA 1987) because of procedural error in the introduction into evidence of various tape recordings between a co-defendant and an undercover informant and a tape recording of conversations among all three defendants secretly recorded after the arrest.

When the case was returned to the trial court, petitioner moved to dismiss on former jeopardy grounds because the remaining evidence was insufficient for conviction without the tape recordings. Under the law of *Burks* v. *U.S.*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed 2d. 15 (1987), a new trial was a violation of the prohibition against former jeopardy afforded by *U.S. Const. amend. V* for the following reasons:

(a) The State of Florida had charged and tried petitioner for the offenses involved.

(b) The case went to judgment.

(c) The Fifth District Court of Appeal of the State of Florida reversed the judgment because of procedural error in the admission of various tape recordings.

(d) Without the tape recordings, there was no direct evidence of petitioner's involvement in the criminal conduct of an alleged co-conspirator other than his physical presence in the general area where the alleged offense occurred and his admission against interest of involvement at some prior time, as found by the appellate court (*Moore* v. *State*, supra):

> (1, 2) In the instant case the state established by independent evidence Moore's presence at the scene of the drug transaction on November 29 and his participation in it. This was not

> enough. We recognize that a conspiracy may be proved by circumstantial evidence, *Resnik* v. *State*, 287 So.2d 24 (Fla. 1973). And, in this case, we consider the circumstantial evidence of Moore's activities at the scene of the incident and his subsequent admission against interest immediately after arrest ("We rushed and made a mistake") sufficient to implicate him as a participant in the offense of trafficking and, marginally, party to the plan at some prior time. Nevertheless, there was no proof—independent or otherwise—that Moore was a party to a conspiracy to traffic at the time of the previously recorded conversations (i.e., those prior to November 29) between Laney and Stansell. As we read the statute, such proof was an essential predicate to the admission of the hearsay statements. Moreover, the statements made by coconspirators after completion of the crime, hence after the conspiracy, do not meet the statutory requirement that such statements, to be admissible, must be made "during the course, and in furtherance, of the conspiracy." See *Wells* v. *State*, 492 So.2d 712, 719 (Fla. 1st DCA 1986); see also *Krulewitch* v. *U.S.*, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949).
>
> (3) We find that the convictions herein were tainted by the erroneous admission of the previously recorded conversations between Laney and Stansell, and the recorded conversations of Laney and Cooper. The conviction on trafficking below was dependent on the conspiracy conviction, inasmuch as the quantity of morphine involved in the conspiracy was constructively imputed to Moore in regard to the trafficking count. Accordingly, we reverse and remand for a new trial on both counts.

(e) After remand, petitioner moved to dismiss the case on former jeopardy charges which was denied (A-10).

(f) The State of Florida thereafter voluntarily amended the Information so that the substantive allegations of the Information were different. Petitioner moved to dismiss or strike the Amended Information on grounds of former jeopardy. The motion was denied (A-14).

(g) The new trial was based on substantially different facts with the benefit of the testimony of co-defendant William Curtis Laney.

(h) The second trial resulted in a conviction and sentence.

(i) On appeal, the judgment on appeal was affirmed, *per curiam*. The issue on appeal was the denial of petitioner's right against former jeopardy.

(j) Petitioner was entitled as a matter of constitutional right under Article V of the United States Constitution to a dismissal of the original Information or a retrial on the *identical charge* on which he had been tried in the first instance, not a trial on a revised and substantively amended charge arising out of the same event.

Ordinarily a reversal on appeal of a criminal conviction because of procedural error other than the insufficiency of the evidence does not preclude a new trial (21 AmJur2d "Criminal Law" sec. 309). Where, however, the evidence is otherwise insufficient to support conviction, the double jeopardy clause of the United States Constitution forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding (*State* v. *Burks*, 267 SE2d 752 [W. Va. 1980]). If the evidence is insufficient to sustain the conviction irrespective of any procedural error that necessitates reversal, the defendant is not required to stand trial again simply because of the procedural defect (*Jackson* v. *State*, 416 A.2d 1353 [Md. App. 1980]). See also *Burks* v. *U.S.*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed 2d 15 (1978); *Kimbler* v. *State*, 360 So.2d 1270 (Fla. 1st DCA 1978); *Coyle* v. *State*, 493 So.2d 550 (Fla. 4th DCA 1986).

The rule on retrial was explained in *Ray* v. *State*, 231 So.2d 813 (Fla. 1970) which holds that a retrial is not barred on double jeopardy grounds where the original conviction was defective. *The retrial, however, is subject to the axiom "that the accused can only be retried for the offense of which he was convicted"* (citing *Green* v. *United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed 2d 199, 61 ALR 2d 1119 [1957]; and *United States* v. *Tateo*, 377 U.S. 463, 84 S.Ct. 1587, 12 L.Ed 2d 448 [1964]).

Ray v. *State* (*supra*) involved a plea of guilty to a charge of burglary which was accepted and judgment of guilt and sentence entered. The judgment was set aside on the motion of the State Attorney. The defendant was rearraigned for burglary and assault arising out of the identical transaction which formed the predicate for the first Information. Defendant again pled guilty and was adjudged guilty and sentenced. Thereafter, an order of nolle prosequi was entered on the first Information.

In the first appeal proceeding (*Ray* v. *State*, 200 So.2d 529 [Fla. 1967]) the judgment was set aside and a new trial was ordered because the defendant had not been informed of his right to counsel and did not have the assistance of counsel as required in *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799, 93 A.L.R. 2d 733 (1963). On remand, the defendant was retried on the second Information. After trial, the defendant was found and adjudged guilty and sentenced. His appeal from that conviction was affirmed *per curiam*.

Before the retrial, however, counsel had moved to quash on the basis that former jeopardy had attached when the defendant's guilty plea was accepted on the first Information. The State's subsequent attempt to set aside the first conviction and Information and the trial on the second Information violated the prohibition against double jeopardy.

The Florida Supreme Court in *Ray* v. *State*, 231 So.2d 813 (Fla. 1970) in recognizing the rule that a retrial of an accused whose conviction is set aside for error in the proceedings leading to conviction ordinarily is not barred by double jeopardy, but is subject to the axiom that the accused can only be retried for the offense of which he was convicted, set aside the second judgment of conviction and sentence, reinstated the first conviction and sentence, and directed a reexamination of the sentence by the trial court.

Reyes v. *Kelly*, 224 So.2d 303 (Fla. 1969), was cited in *Ray* for authority. *Reyes* involved a plea of guilty to second degree murder which was accepted. The State thereafter entered a written plea of nolle prosequi and presented the matter to the grand jury and obtained an indictment for first degree murder. Because of the former jeopardy, the later proceedings was found to be a *brutum fulmen* and wholly without standing.

In the case at bar, the motions to dismiss the original Information on double jeopardy grounds were denied (A-10). When the State of Florida amended the Information to plead different facts as to Count II, the nature of the conspiracy, the issue was raised again by motion to dismiss or strike and at arraignment (A-14). The court announced that its order on double jeopardy applied to the Amended Information as well as the original Information (A-14). Applying the principle of *Ray*, *Reyes*, and *Green* v. *United States* (all supra), it is apparent that the second trial on the Amended Information as to Count II was a *brutum fulmen* and violated the prohibition against double jeopardy as prohibited by the Constitution because appellant was not tried on the original Information upon which the first trial was held.

The State after reversal following the first trial in the case at bar was required to try appellant on the charge set forth in the original Information pursuant to the mandate of the District Court of Appeal. The State has, however, conceded that the facts of the conspiracy cannot be proven. Laney's testimony shows those facts to be other than as alleged in the original Information and that appellant's involvement did not come into being until just before the arrest.

The appellate court in *Moore* v. *State*, 503 So.2d 923 (Fla. 5th DCA 1987) found the evidence to convict appellant as only marginal and reversed because of procedural error in admitting the tape recordings of hearsay conversation as evidence. On remand, the state acknowledged the insufficiency of the evidence to convict for this incident in the first trial by voluntarily amending the Information as to the operative facts of the conspiracy and by not using the tape recordings of hearsay conversations preceding the day of arrest. The State called Laney as a witness to testify as to the conspiracy to traffic he had with Moore. The facts of the conspiracy were substantively different from that presented and charged in the original Information and argued at the first trial. The tapes which were used as evidence in the second trial did not implicate appellant. Only Laney's testimony implicated Moore, and the facts were substantially different in nature from that in the first trial. Laney, who was called as a State witness, testified of Moore's involvement only in the perspective of the revised conspiracy facts.

The State of Florida was unable to convict petitioner on proper evidence at the first trial. It prevailed upon Laney to become a State witness and found that its theory of the facts was wrong as to appellant in the first trial. The State of Florida thereupon voluntarily amended the Information and tried petitioner on different facts for the same offense. *U.S. Const. amend. V* prohibits this kind of vendetta and is designed as a protection against the unbridled power of government to obtain a criminal conviction at any cost. The State of Florida had its opportunity to try petitioner and to convict him with due process. It was unable to do so. Petitioner should not have been required to defend on different facts where the facts of the first trial were insufficient to convict, and the State thereafter made an entirely different case on different facts and evidence arising from the same incident. Because the first count of the Information is inextricably entwined with the subject of the second count, the defense of former jeopardy should apply to both counts.

CONCLUSION

The petition for writ of certiorari should issue to the District Court of Appeal, Fifth District of Florida, to review its denial of petitioner's appeal from the judgment and sentence of the Circuit Court of Volusia County. Thereafter, the District Court of Appeal should be ordered to vacate its ruling of affirmance and be directed to reverse the judgment and sentence of the Circuit Court with directions to dismiss the Amended Information against petitioner as defendant below.

Respectfully submitted,

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APPENDIX

APPENDIX

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FLORIDA STATUTE

STATE OF FLORIDA

vs.

WILLIAM CURTIS LANEY
CLARENCE MOORE
ELVA VANESSA COOPER

CLASSIFICATION: FELONY

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA, IN THE YEAR OF OUR LORD ONE THOUSAND NINE HUNDRED AND EIGHTY-FIVE

Case No. 84-4660-SP

INFORMATION

STEPHEN L. BOYLES, State Attorney for the Seventh Judicial Circuit of the State of Florida and as such prosecuting attorney for this Court, in the name of and by the authority of the State of Florida brings this prosecution and makes the following charge or charges in FOUR (4) counts:

COUNT I

Charge: TRAFFICKING IN MORPHINE, in Violation of F.S. 893.135(1)(c)(3)

Specifications of charge: In that WILLIAM CURTIS LANEY, CLARENCE MOORE, and ELVA VANESSA COOPER, on or about the 29th day of November, 1984, at or near Daytona Beach within Volusia County, Florida were knowingly in actual or constructive possession of morphine or any salt, isomore, or salt of an isomer thereof, or mixture containing such substance, to-wit: five hundred (500) hydromorphone tablets, and the quantity of morphine or mixture thereof was more than twenty-eight (28) grams.

COUNT II

Charge: CONSPIRACY TO TRAFFIC IN MORPHINE (28 GRAMS OR MORE), in Violation of F.S. 893.135(4)

Specifications of charge: In that WILLIAM CURTIS LANEY, CLARENCE MOORE, and ELVA VANESSA COOPER, on or between the 20th day of November, 1984 and the 29th day of November, 1984, within Volusia County, Florida, did agree, conspire, combine, or confederate with each other to knowingly sell, manufacture, deliver, or to knowingly be in

actual or constructive possession of morphine or any mixture containing morphine, in a quantity of twenty-eight (28) grams or more, to-wit: that WILLIAM CURTIS LANEY on November 20, 1984 did meet CI M-102-S and discuss trading cocaine for a large amount of dilaudids, a/k/a morphine, or purchasing several hundred dilaudids with U.S. currency; that in support of said conspiracy and in furtherance thereof WILLIAM CURTIS LANEY did negotiate with CI M-102-S on November 28, 1984 for the purchase of five hundred (500) dilaudids, a/k/a morphine at Fifteen Dollars ($15.00) per pill for a total purchase price of Seven Thousand Five Hundred Dollars ($7,500.00); that in support of said conspiracy and in furtherance thereof WILLIAM CURTIS LANEY instructed CI M-102-S to meet him at Denny's Restaurant located at the intersection of U.S. 92 and I-95 the following day at 12 p.m. to finalize the narcotics transaction; that in support of said conspiracy and in furtherance thereof WILLIAM CURTIS LANEY did meet CI M-102-S on November 29, 1984 at said business establishment where he observed the five hundred (500) dilaudids contained within five (5) bottles and indicated he had an insufficient amount of U.S. currency and would have to go to CLARENCE MOORE'S home for the remainder of the cash; that in support of said conspiracy and in furtherance thereof WILLIAM CURTIS LANEY, CLARENCE MOORE and ELVA VANESSA COOPER returned to said business establishment with Seven Thousand Five Hundred Dollars ($7,500.00) in U.S. currency; WILLIAM CURTIS LANEY then met with CI M-102-S who exchanged two (2) of the bottles of dilaudids for One Thousand Dollars ($1,000.00) in U.S. currency; WILLIAM CURTIS LANEY then returned to his pick-up truck where CLARENCE MOORE and ELVA VANESSA COOPER examined the narcotics and CLARENCE MOORE turned over to WILLIAM CURTIS LANEY a bag containing Six Thousand Five Hundred Dollars ($6,500.00) in U.S. currency for the remaining narcotics; in support of said conspiracy and in furtherance thereof WILLIAM CURTIS LANEY then exchanged the Six Thousand Five Hundred Dollars ($6,500.00) in U.S. currency for the remaining three (3) bottles of dilaudids.

COUNT III

Charge: UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE, in Violation of F.S. 893.13(1)(e)

Specifications of Charge: In that WILLIAM CURTIS LANEY, on or about the 29th day of November, 1984, at or near Daytona Beach within Volusia County, Florida, did then and there unlawfully have in his possession or under his control a Schedule II controlled substance, to-wit: cocaine.

COUNT IV

Charge: CARRYING A CONCEALED FIREARM, in Violation of F.S. 790.01(2)

Specifications of charge: In that WILLIAM CURTIS LANEY, on or about the 29th day of November, 1984, at or near Daytona Beach within Volusia County, Florida, did then and there unlawfully carry on or about his person a concealed firearm, to-wit: a .38 caliber revolver or .25 caliber pistol.

APPROVED BY:

/s/ GREG A. JOHNSON
Assistant State Attorney

COUNTY OF VOLUSIA)
STATE OF FLORIDA)

FOR THE STATE ATTORNEY

/s/ MELVIN STACK
Assistant State Attorney
for the
Seventh Judicial Circuit
of the State of Florida

Personally appeared before me MELVIN STACK, Assistant State Attorney, for the Seventh Judicial Circuit of the State of Florida, known to me to be the foregoing prosecuting officer, who being duly sworn, says that the allegations set forth in the foregoing information are based upon facts that have been sworn to as true, and which, if true, would constitute the offense therein charged. Subscribed in good faith. Said facts based on testimony of material witnesses.

SWORN to and subscribed before me this 8 day of JANUARY, A.D. 1985

/s/ MAXINE BUCKLES
Notary Public at Large
State of Florida
(SEAL)

☐ PROBATION VIOLATOR
(Check if Applicable)

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA
DIVISION CRIMINAL

STATE OF FLORIDA

Case No. 84-4660-SP

vs

CLARENCE MOORE,
Defendant.

JUDGMENT

The Defendant, CLARENCE MOORE, being personally before this Court represented by Louis Ossinsky, his attorney of record, and having:

(Check Applicable Provision)

☒ Been tried and found guilty of the following crime(s)

☐ Entered a plea of guilty to the following crime(s)

☐ Entered a plea of nolo contendere to the following crime(s)

COUNT	CRIME	OFFENSE STATUE NUMBER(S)	DEGREE OF CRIME	CASE NUMBER
I	Trafficking in Morphine	F.S. 893.135(1)(c)(3)	1F	
II	Conspiracy to Traffic in Morphine (28 grams or more)	F.S. 893.135(4)	1F	

and no cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the above crime(s).

The Defendant is hereby ordered to pay the sum of fifteen dollars ($15.00) pursuant to F.S. 960.20 (Crimes Compensation Trust Fund). The Defendant is further ordered to pay the sum of two dollars ($2.00) as a court cost pursuant to F.S. 943.25(4).

☐ The Defendant is ordered to pay an additional sum of two dollars ($2.00) pursuant to F.S. 943.25(8).
(This provision is optional; not applicable unless checked).

(Check if Applicable)

☐ The Defendant is further ordered to pay a fine in the sum of $_____ pursuant to F.S. 775.0835.
(This provision refers to the optional fine for the Crimes Compensation Trust Fund, and is not applicable unless checked and completed. Fines imposed as part of a sentence pursuant to F.S. 775.083 are to be recorded on the Sentence page(s)).

☐ The Court hereby imposes additional court costs in the sum of $_____.

Imposition of Sentence Stayed and Withheld
(Check if Applicable)

☐ The Court hereby stays and withholds the imposition of sentence as to count(s) _____ and places the Defendant on probation for a period of _____ under the supervision of the Department of Corrections (conditions of probation set forth in separate order.)

Sentence Deferred Until Later Date
(Check if Applicable)

☐ The Court hereby defers imposition of sentence until _____ (date)

The Defendant in Open Court was advised of his right to appeal from this Judgment by filing notice of appeal with the Clerk of Court within thirty days following the date sentence is imposed or probation is ordered pursuant to this adjudication. The Defendant was also advised of his right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

FINGERPRINTS OF DEFENDANT
(Not Included)

DONE AND ORDERED in Open Court at Daytona Beach/Volusia County, Florida, this 18 day of December A.D., 1985. I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, CLARENCE MOORE and that they were placed thereon by said Defendant in my presence in Open Court this date.

/s/ C. McFerrin Smith, III
Judge

C. MCFERRIN SMITH, III
Circuit Judge

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT JANUARY TERM 1987

CLARENCE MOORE,
Appellant,

Case No. 85-1918

vs.

STATE OF FLORIDA,
Appellee.

Opinion filed February 12, 1987

Appeal from the Circuit Court for Volusia County,
C. McFerrin Smith, III, Judge.

Louis Ossinsky, Jr., of Ossinsky,
Krol and Hess, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Joseph N. D'Achille, Jr.,
Assistant Attorney General, Daytona Beach, for Appellee

COBB, J.

The defendant below, Clarence Moore, appeals his conviction for (1) trafficking in morphine in excess of 28 grams and (2) conspiracy to traffic in morphine. The principal issue on appeal is whether the trial court erred in admitting tape recorded conversations involving hearsay statements of coconspirators. Two of these conversations occurred between a codefendant (Laney) and a police informant (Stansell) on dates prior to the date of arrest, November 29, 1985; one occurred between Moore, Laney and a codefendant, Elva Cooper, immediately after their arrests on November 29, 1985.

Section 90.803(18)(e), Florida Statutes (1985), provides for the admissibility of a statement by a coconspirator "during the course, and in furtherance, of the conspiracy." This statute further provides that "the conspiracy itself and each member's participation in it must be established by independent evidence" prior to the introduction of such statements.

In the instant case the state established by independent evidence Moore's presence at the scene of the drug transaction on November 29 and his participation in it. This was not enough. We recognize that a conspiracy may be proved by circumstantial evidence, *Resnick* v. *State*, 287 So.2d 24 (Fla. 1973). And, in this case, we consider the circumstantial evidence of Moore's activities at the scene of the incident and his subsequent admission against interest immediately after arrest ("We rushed and made a mistake") sufficient to implicate him as a participant in the offense of trafficking and, marginally, party to the plan at *some* prior time. Nevertheless, there was no proof—independent or otherwise—that Moore was a party to a conspiracy to traffic at *the* time of the previously recorded conversations (*i.e.*, those prior to November 29) between Laney and Stansell. As we read the statute, such proof was an essential predicate to the admission of the hearsay statements. Moreover, the statements made by coconspirators *after* completion of the crime, hence *after* the conspiracy, do not meet the statutory requirement that such statements, to be admissible, must be made "during the course, and in furtherance, of the conspiracy." *See Wells* v. *State*, 492 So.2d 712, 719 (Fla. 1st DCA 1986); *see also Krulewitch* v. *U.S.*, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949).

We find that the convictions herein were tainted by the erroneous admission of the previously recorded conversations between Laney and Stansell, and the recorded conversations of Laney and Cooper. The conviction on trafficking below was dependent on the conspiracy conviction, inasmuch as the quantity of morphine involved in the conspiracy was constructively imputed to Moore in regard to the trafficking count. Accordingly, we reverse and remand for a new trial on both counts.

REVERSED and REMANDED.
DAUKSCH J. concurs.
SHARP, W.J., concurs specially with opinion.
SHARP, W., J., concurring specially

Moore's conviction for conspiracy to traffic in morphine must be reversed and a new trial granted due to the erroneous admission of taped conversations between Stansell and alleged coconspirator Laney, on November 20, 1985 and November 28, 1985. There is no independent evidence that Moore was a party to the conspiracy on those dates. Therefore, the tapes are not relevant to prove Moore's participation in the conspiracy. *Nelson* v. *State*, 490 So.2d 32 (Fla. 1986). Similarly, the post-arrest admissions of the other codefendants should not have been admitted against Moore since at that time the conspiracy had concluded. *Wells* v. *State*, 492 So.2d 712 (Fla. 1st DCA 1986). Their erroneous admission on the conspiracy charge was reversible error.

There was sufficient minimal evidence of Moore's participation in a conspiracy to purchase morphine on November 29, 1985, the day of the purchase and arrest, to make coconspirators' statements on that day admissible. A conspiracy can be proved in part by the circumstantial evidence that a person was present and participated in the crime. *See Resnick* v. *State*, 287 So.2d 24 (Fla. 1973); *State* v. *Morales*, 460 So.2d 410 (Fla. 2d DCA 1984). Further, Moore's admission that "We rushed and made a mistake" clearly provides additional independent evidence of a joint enterprise undertaken by himself and Laney to purchase morphine, at least on the day of the sale.

Therefore on remand, Laney's statements[1] to Stansell on November 29th should be admissible against Moore pursuant to section 90.803(18)(e), Florida Statutes (1985) on retrial. These statements were made in furtherance of the drug buy, and while the conspiracy was ongoing.

[1] Laney stated that Mo Boy was "his man" who had funds to buy the drugs. Also, during the purchase Laney stated Moore wanted to inspect the drugs and after he had done so, "was pleased."

STATE OF FLORIDA

vs.

CLARENCE MOORE,
Defendant.

IN THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY,
FLORIDA

Case No. 84-4660-SP

ORDER

THIS CAUSE is before the Court on motions of the defendant to dismiss both counts of the information. The defendant was previously tried, convicted and sentenced, but the District Court of Appeal, Fifth District, reversed and remanded for a new trial on both counts.

The district court has ruled that certain heresay evidence was improperly admitted and that the conviction was thus "tainted." This Court has been ordered to retry the case without improperly admitting this heresay evidence. This in no way constitutes a ruling by the district court that the evidence was insufficient as a matter of law to support the jury's conviction. The district court in fact specifically found the evidence "sufficient" to implicate the defendant as a participant in the trafficking offense and, marginally, as a party to the plan (a conspirator).

Accordingly, there is no former jeopardy bar to retrial, a conclusion the district court obviously shares in light of its direct order that this Court conduct a new trial.

The defendant's motion are denied.

DONE and ORDERED in Chambers at Daytona Beach, Volusia County, Florida, this 16 day of April, A.D., 1987.

/s/ C. McFerrin Smith, III
C. McFerrin Smith, III
Circuit Judge

Copies to:

Louis Ossinsky, Esquire
Melvin Stack, Assistant State Attorney

FLORIDA STATUTE

STATE OF FLORIDA

vs.

WILLIAM CURTIS LANEY
CLARENCE MOORE
ELVA VANESSA COOPER

CLASSIFICATION: FELONY

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA, IN THE YEAR OF OUR LORD ONE THOUSAND NINE HUNDRED AND EIGHTY-SEVEN

Case No. 84-4660-SP

AMENDED INFORMATION

STEPHEN L. BOYLES, State Attorney for the Seventh Judicial Circuit of the State of Florida and as such prosecuting attorney for this Court, in the name of and by the authority of the State of Florida brings this prosecution and makes the following charge or charges in TWO (2) counts:

COUNT I

Charge: TRAFFICKING IN MORPHINE, in Violation of F.S. 893.135(1)(c)3

Specifications of charge: In that CLEARENCE MOORE, WILLIAM CURTIS LANEY, and ELVA VANESSA COOPER, on or about the 29th day of November, 1984, at or near Daytona Beach within Volusia County, Florida, were knowingly in actual or constructive possession of morphine or any salt, isomer, or salt of an isomer thereof, or mixture containing such substance, to-wit: five hundred (500) hydromorphone tablets, and the quantity of morphine or mixture thereof was more than twenty-eight (28) grams.

COUNT II

Charge: CONSPIRACY TO TRAFFIC IN MORPHINE (28 GRAMS OR MORE), in Violation of F.S. 893.135(4)

Specifications of charge: In that CLARENCE MOORE, WILLIAM CURTIS LANEY, and others known and unknown, on or between the 28th day of November, 1984 and the 29th day of November, 1984, within Volusia County, Florida, did agree, conspire, combine, or confederate with each other to knowingly sell, deliver or to knowingly be in actual or constructive possession of morphine or any mixture containing morphine, in a quantity of twenty-

eight (28) grams or more, to-wit: that CLARENCE MOORE and WILLIAM CURTIS LANEY did agree to purchase five hundred (500) morphine derivative pills that had a total weight of approximately forty-five (45) grams.

APPROVED BY:

/s/ GREG A. JOHNSON
Assistant State Attorney
Division Chief
Special Prosecution Division

COUNTY OF VOLUSIA)
STATE OF FLORIDA)

FOR THE STATE ATTORNEY

/s/ MELVIN STACK
Assistant State Attorney
for the
Seventh Judicial Circuit
of the State of Florida

Personally appeared before me MELVIN STACK, Assistant State Attorney, for the Seventh Judicial Circuit of the State of Florida, known to me to be the foregoing prosecuting officer, who being duly sworn, says that the allegations set forth in the foregoing information are based upon facts that have been sworn to as true, and which, if true, would constitute the offense therein charged. Subscribed in good faith. Said facts based on testimony of material witnesses.

SWORN to and subscribed before me this 3rd day of APRIL, A.D. 1987

/s/ DONNA FERRELL
Notary Public at Large
State of Florida
(SEAL)

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR VOLUSIA COUNTY
CRIMINAL CASE NO. 84-4660-SP

STATE OF FLORIDA

vs.

CLARENCE MOORE,
Defendant.

HEARING
Volusia County Courthouse Annex
Daytona Beach, Florida
April 30, 1987
4:00 p.m.

TRANSCRIPT OF PROCEEDINGS

The above-styled cause came on to be heard before the Honorable C. McFerrin Smith, Circuit Judge, at the time and place above indicated, for the purpose of taking testimony and evidence in said cause.

APPEARANCES: MELVIN STACK, ESQUIRE
Assistant State Attorney
Representing the State of Florida

LOUIS OSSINSKY, ESQUIRE
Representing the Defendant

ALSO PRESENT CLARENCE MOORE, DEFENDANT
Others as may appear in the transscript

WHEREUPON the following proceedings were had:

(EXCERPT)

and I think we can proceed. What else?

MR. OSSINSKY: That's it, Judge.

THE COURT: And I presume if we agree that the—if chronologically it wasn't already done, that the motion to dismiss on former jeopardy grounds applies, regardless—it applies to the amended information and the order on it, right?

MR. OSSINSKY: No, the order that you originally entered was done, I believe, after I filed the amended information. But I'm not sure whether it was—the Court intended to apply to that because I—you weren't dealing with that at that time.

THE COURT: I intended in my order of April 16 to apply to your motion to dismiss the amended information. I don't know that you had filed any piece of paper asking for your motion to apply to the amended information as opposed to the original information, but the grounds for your motion fit, your argument fit. And the changes in the information didn't undermine your motion to dismiss in any way.

Your motions are either good or aren't good as to both informations, and so I went ahead and entered the order of April 16th intending that to apply to the amended information, assuming your motion to dismiss stood open.

MR. OSSINSKY: That's fine, Judge. As long as the record clearly indicates that it was intended.

THE COURT: I don't think I can say it any clearer. The order was intended to take into consideration the current status of the pleadings at that time. And I believe they are still current, is that correct?

MR. STACK: That's correct.

THE COURT: So your former jeopardy grounds are totally preserved.

MR. OSSINSKY: That's fine.

THE COURT: Anything else?

MR. OSSINSKY: Not on the motion, Your Honor. We would enter a plea—subject to those rulings, we would enter a plea of not guilty to the amended information.

THE COURT: Okay. I'll enter the not guilty plea and, of course, I believe—I think the matter is already scheduled for trial.

MR. OSSINSKY: It's on the docket for the week of May 26th, I believe.

THE COURT: If I'm still here at that time, I'll see you, gentlemen, there; if not, whoever is here will. So, I appreciate your—

MR. OSSINSKY: The only possible thing that I can think of that may have some effect, we have got a

☐ PROBATION VIOLATOR
(Check if Applicable)

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA
DIVISION CRIMINAL

STATE OF FLORIDA

Case No. 84-4660-SP

vs

CLARENCE MOORE,
Defendant.

JUDGMENT

The Defendant, CLARENCE MOORE, being personally before this Court represented by Louis Ossinsky, his attorney of record, and having:

(Check Applicable Provision)

☒ Been tried and found guilty of the following crime(s)

☐ Entered a plea of guilty to the following crime(s)

☐ Entered a plea of nolo contendere to the following crime(s)

COUNT	CRIME	OFFENSE STATUE NUMBER(S)	DEGREE OF CRIME	CASE NUMBER
I	Trafficking in Morphine	F.S. 893.135(1)(c)(3)	1F	
II	Conspiracy to Traffic in Morphine	F.S. 893.135(4)	1F	

and no cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the above crime(s).

The Defendant is hereby ordered to pay the sum of Twenty dollars ($20.00) pursuant to F.S. 960.20 (Crimes Compensation Trust Fund). The Defendant is further ordered to pay the sum of ($3.00) as a court cost pursuant to F.S. 943.25(4) and the sum of $_____ as a court cost pursuant to F.S. 943.25(8)(a).

☐ The Defendant is ordered to pay an additional sum of two dollars ($2.00) pursuant to F.S. 943.25(8).
(This provision is optional; not applicable unless checked).

(Check if Applicable)

☐ The Defendant is further ordered to pay a fine in the sum of $_____ pursuant to F.S. 775.0835.
(This provision refers to the optional fine for the Crimes Compensation Trust Fund, and is not applicable unless checked and completed. Fines imposed as part of a sentence pursuant to F.S. 775.083 are to be recorded on the Sentence page(s)).

☐ The Court hereby imposes additional court costs in the sum of $_____ pursuant to F.S. 27.3455(1).

Imposition of Sentence Stayed and Withheld *(Check if Applicable)*

☐ The Court hereby stays and withholds the imposition of sentence as to count(s) _____ and places the Defendant on probation for a period of _____ under the supervision of the Department of Corrections (conditions of probation set forth in separate order.)

Sentence Deferred Until Later Date *(Check if Applicable)*

☐ The Court hereby defers imposition of sentence until _____ (date)

The Defendant in Open Court was advised of his right to appeal from this Judgment by filing notice of appeal with the Clerk of Court within thirty days following the date sentence is imposed or probation is ordered pursuant to this adjudication. The Defendant was also advised of his right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

FINGERPRINTS OF DEFENDANT
(Not Included)

DONE AND ORDERED in Open Court at Daytona Beach/Volusia County, Florida, this 29 day of May A.D., 1987. I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, CLARENCE MOORE and that they were placed thereon by said Defendant in my presence in Open Court this date.

/s/ ROBERT S. HEWITT
Judge

ROBERT S. HEWITT
Circuit Judge

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT JANUARY TERM 1988

CLARENCE MOORE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

Case No. 87-1179

Decision filed March 15, 1988

Appeal from the Circuit Court for Volusia County,
C. McFerrin Smith, Judge.

Louis Ossinsky, Jr., of Ossinsky,
Krol and Hess, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and W. Brian Bayly,
Assistant Attorney General, Daytona Beach, for Appellee

PER CURIAM.
AFFIRMED.

ORFINGER, COWARD AND DANIEL, JJ., concur.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

CLARENCE MOORE,

Appellant,

Case No. 87-1179

vs.

STATE OF FLORIDA,

Appellee.

DATE: April 19, 1988

BY ORDER OF THE COURT:

ORDERED that Appellant's MOTION FOR REHEARING, filed March 22, 1988, is denied.

I hereby certify that the foregoing is (a true copy of) the original court order.

Frank J. Habershaw, *Clerk*

By: /s/ FRANK J. HABERSHAW
Deputy Clerk

(COURT SEAL)

CC: Louis Ossinsky, Jr., Esq.
Office of the Attorney General,
Daytona Beach